No. 15-631

In the
Supreme Court of the United States

ARRIGONI ENTERPRISES, LLC,

Petitioner,

v.

TOWN OF DURHAM; DURHAM PLANNING AND ZONING COMMISSION; and DURHAM ZONING BOARD OF APPEALS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY

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QUESTIONS PRESENTED

1. Whether the Court should reconsider, and then overrule or modify, the portion of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), barring property owners from filing a federal takings claim in federal court until they exhaust state court remedies, when this rule results in numerous jurisdictional "anomalies" and has a "dramatic" negative impact on takings law, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 351-52 (2005) (Rehnquist, C.J., concurring)?

2. Alternatively, whether federal courts can and should waive *Williamson County*'s state litigation requirement for prudential reasons when a federal takings claim is factually concrete without state procedures, as some circuit courts hold, or apply the requirement as a rigid jurisdictional barrier, as other circuits hold?

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INTRODUCTION AND SUMMARY OF ARGUMENT

Arrigoni Enterprises' (Arrigoni) Petition for Certiorari asks this Court to address the most troubling and confused doctrine in modern Fifth Amendment's takings jurisprudence: the "state litigation" ripeness doctrine announced in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). This unique doctrine generally requires property owners to exhaust state court remedies before asserting an unconstitutional takings claim. Because of the doctrine's destructive effect on takings litigation, its questionable origin, and the circuit conflict it has generated, commentators and judges, including four Justices of this Court, have urged this Court to reconsider *Williamson County*. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348-52 (2005) (Rehnquist, C.J., concurring). The Petition asks the Court to take that step here, and to modify or overrule the state litigation rule.

In its Opposition Brief, Respondents Town of Durham, et al. (Town) seeks to confuse the state litigation question by arguing that this case suffers from an additional ripeness infirmity, one arising from *Williamson County*'s first, "final decision," ripeness prong. 473 U.S. at 186-92. But there is no such problem. "Final decision" ripeness issues were never raised, argued, or decided below. Instead, the Town conceded finality. Opp. Brief at 10. The state litigation issue is isolated for review.

As to the lower court conflict, the Town argues that the conflict on whether the state litigation doctrine is a strict jurisdictional bar or a flexible prudential rule is not sufficiently developed to warrant review. It is wrong here too. The issue has cycled through the circuit courts, and the result is direct and substantial conflict. *See Perfect Puppy, Inc. v. City of East Providence, R.I.*, 807 F.3d 415, 421 n.6 (1st Cir. 2015) (noting conflict).

Ultimately, the Town capably (if mistakenly) defends *Williamson County*'s state litigation ripeness rule on the merits. This case accordingly presents a clear, direct, and focused opportunity to reconsider and overrule *Williamson County*. Alternatively, the Court should grant the Petition to clarify whether the state litigation rule is a mere prudential rule, which lower courts may waive when appropriate, an issue on which courts conflict.

ARGUMENT

I

THE STATE LITIGATION RIPENESS ISSUE IS ISOLATED AND CLEANLY PRESENTED FOR REVIEW

As the Court is aware, *Williamson County* did not just establish the controversial state litigation ripeness requirement challenged here. It also held that a property owner must have obtained a final agency decision before raising a takings claim against land use regulations. 473 U.S. at 186-92.

Many takings cases undoubtedly implicate both prongs of *Williamson County*'s ripeness doctrine, making it relatively unusual to see the state litigation

issue stand alone. However, this is not one of those multi-issue cases. The only ripeness requirement raised, argued, and decided below was the state litigation rule. The district court granted the Town's motion to dismiss Arrigoni's takings claim solely on the ground that Arrigoni failed to exhaust state court procedures, as purportedly required by *Williamson County*.

As the Town puts it: "The issue of finality was not . . . put before the District Court, nor addressed by it. Likewise, the issue of finality was not before the Second Circuit Court of Appeals, nor addressed during the course of Arrigoni's appeal of this matter." Opp. Brief at 10. The "final decision" issue was never an issue below because the Town "conceded" finality ripeness for purposes of the motion to dismiss proceedings that ultimately disposed of Arrigoni's claim. Again, the Town explains:

> [I]n moving to dismiss Arrigoni's claims as unripe, the Respondents [Town] expressly noted that they did not dispute, "*solely for purposes of their Motion to Dismiss*," that certain denials by the [Town] constituted "final decisions" under the first prong of *Williamson County*'s ripeness test.

Opp. Brief at 10.

The state litigation ruling presented here comes to this Court from those very dismissal rulings. Consequently, the case arrives here with the Town's "finality" concession intact, and the only ripeness issue before this Court is the state litigation-based dismissal. Perhaps the Town could raise an additional, final decision ripeness issue if the Court reversed the

lower court's state litigation ripeness ruling, and remanded the case to the lower court for further proceedings. But it cannot raise it now. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 728-29 (2010) (defendant waived *Williamson County* arguments by not raising them below).

This case accordingly presents the Court with an unusually clear and narrow vehicle for reconsidering *Williamson County*'s state litigation rule. It should do so. There is no doctrinal, textual, or logical reason for demanding that a takings claimant exhaust state court proceedings when the challenged governmental action is final and the government has no means or intent to compensate. That is the situation here. The Town's permit denials are conceded to be final, it has no mechanism to compensate Arrigoni, and it has never offered compensation in the ten years since Arrigoni asserted a taking of its property. Arrigoni's takings claim should be justiciable now. *Horne v. Department of Agriculture*, 133 S. Ct. 2053, 2062 n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it.").

Williamson County interposes an unnecessary and incorrect barrier to adjudication of already justiciable federal takings claims, *see id.*, in demanding that litigants complete state court litigation. And in so doing, it injected vast confusion and injustice into federal takings litigation. *See San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J., concurring). The Court should grant the Petition.

II

THERE IS A CLEAR AND DEVELOPED CONFLICT ON WHETHER *WILLIAMSON COUNTY*'S STATE PROCEDURES DOCTRINE IS PRUDENTIAL OR JURISDICTIONAL

The second question presented by Arrigoni's Petition asks this Court to clarify whether *Williamson County*'s state litigation doctrine functions as a flexible, prudential rule or as a strict jurisdictional barrier to takings claims. The issue is highly important because federal courts adhering to a prudential view may decline to apply the state court litigation rule, when particular considerations favor immediate takings review. But, if the state litigation doctrine is jurisdictional, a court cannot hear a takings case, absent state court procedures, no matter how concrete and otherwise justiciable the case.

As commentators have documented, courts are in clear conflict on whether the state litigation requirement is a prudential or jurisdictional ripeness doctrine. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 Washburn L.J. 43, 98 (2014); *see also*, Amicus Brief of Cato Institute Supporting Petitioner at 15-18. The Town contends, however, that the conflict is not sufficiently developed because courts have had too little time to consider the issue in light of decisions from the Court. Opp. Brief at 28. The Town seems to believe that this Court only initially described *Williamson County* as prudential in 2010 and, thus, that lower courts have only had a few years to accommodate a prudential view. *Id.*

The Town is mistaken. In the 1997 decision of *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997), this Court stated that *Williamson County*'s ripeness doctrine is "prudential." Courts have had twenty years since then to consider whether they should also apply *Williamson County* as a prudential ripeness consideration, rather than as a jurisdictional barrier. Dozens of decisions address the issue. Despite this depth of review, courts remain in conflict. Some treat the state litigation doctrine as a prudential rule that may be waived. Others apply the rule as a jurisdictional bar and never exempt takings plaintiffs from *Williamson County*'s state litigation doctrine. Callies, *Through a Glass Clearly*, 54 Washburn L.J. at 98.

Still, the Township attempts to minimize the conflict by claiming that only the First Circuit really adheres to a jurisdictional view, while all others adopt a prudential view. This is incorrect. The decisions of the Eighth Circuit, *Snaza v. City of St. Paul, Minn.*, 548 F.3d 1178,1182 (8th Cir. 2008), Eleventh Circuit, *Busse v. Lee County, Fla.*, 317 Fed. Appx. 968, 972 (11th Cir. 2009)—as well as the First Circuit, *Downing/Salt Pond Partners, L.P. v. Rhode Island & Providence Plantations*, 643 F.3d 16, 20 (1st Cir. 2011)—adhere to a jurisdictional view of *Williamson County*'s state litigation requirement. On the other hand, the decisions of the Fourth, Fifth, and Ninth Circuits unequivocally adopt the prudential understanding. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 544-45 (4th Cir. 2013); *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010).

A very recent appellate court decision confirms the conflict. In *Perfect Puppy, Inc.*, the First Circuit considered whether *Williamson County*'s state litigation rule is jurisdictional or prudential, in weighing whether the district court properly remanded a takings claim to state court. 807 F.3d at 421. The court concluded that First Circuit precedent treats the state litigation rule as a *jurisdictional* predicate. *Id.* The court conceded, however, that it was "not 100% sure that the state-exhaustion requirement *actually* is jurisdictional," because it recognized this Court's precedent has "described the state-exhaustion requirement as a prudential principle rather than a jurisdictional limitation." *Id.* The court acknowledged that "[o]ther circuits, for what it is worth,[1] have read recent Supreme Court cases as holding that the state-exhaustion requirement is not jurisdictional," in contrast to the First Circuit's own jurisdictional view. *Id.* at 421 & n.6. *Perfect Puppy* thus confirms the confusion among circuit courts on the *Williamson County* jurisdictional/prudential issue.

Therefore, if this Court is not inclined to grant the Petition to overrule *Williamson County*'s state litigation requirement, it should grant it to resolve the conflict among the courts on whether the requirement is a prudential rule, one courts may ignore if circumstances warrant immediate review of a takings claim.

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[1] It is actually "worth" quite a bit, since one of the bases for this Court's discretionary review is conflict among the lower federal courts. Sup. Ct. R. 10(a).

CONCLUSION

The Court should grant the Petition.

DATED: January, 2016.

Respectfully submitted,

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